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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

JUST A FLUKE, INC.,

Plaintiff and Appellant,

v.

GEATAN JOSEPH LITALIEN et al.,

Defendants and Respondents.

G055958

(Super. Ct. No. 30-2017-00917590)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Geoffrey T. Glass, Judge. Request to augment the record and request for judicial notice granted. Judgment reversed and remanded with directions.

Morrow & White, William D. Morrow, Stephen D. Bays, Jesse S. Abrams; Law Offices of Christopher P. Ruiz and Christopher P. Ruiz for Plaintiff and Appellant.

Stuart Kane, Donald J. Hamman and Eve A. Brackmann for Defendants and Respondents.

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Plaintiff Just a Fluke, Inc. and defendants Jacques Litalien and Anita Litalien¹ were parties to a JAMS arbitration (Arbitration) concerning certain breach of contract and fraud claims arising out of a construction contract. But a further dispute arose after defendants demanded the Arbitration be designated a consumer arbitration.²

Plaintiff eventually filed this action (Action) in the superior court seeking a declaration that the Arbitration could not proceed as a consumer arbitration, and that the arbitration provision in the construction contract was unenforceable based on JAMS's preliminary decision to have the Arbitration proceed as a consumer arbitration.

Defendants then filed a petition to compel JAMS arbitration of this Action. The court treated the petition as a motion to dismiss, dismissed this Action and ordered JAMS to decide whether the Arbitration should proceed as a consumer arbitration. The court reasoned this Action was an improper attempt to have it enforce JAMS's rules.

Plaintiff argues the court erred by treating the petition to compel arbitration as a motion to dismiss, and by dismissing this Action without notice; and further that even if defendants had filed a motion to dismiss, the court had no authority to grant it.

Defendants contend it was proper for the court to treat the petition to compel arbitration as a motion to dismiss; the court had the inherent authority and discretion to dismiss this Action; dismissal was warranted because this Action was frivolous and filed to harass them, and because plaintiff "judge shopped" when filing it; and, even if we find the dismissal was improper, we should remand to the trial court with directions to grant their petition to compel arbitration of this Action or to stay it.

¹ After this Action was filed Jacques Litalien died and his son, Geatan Joseph Litalien (Geatan), was designated as a beneficiary successor in interest under Code of Civil Procedure section 377.10 et seq. In addition, pursuant to Code of Civil Procedure sections 372 and 373, subdivision (c), Geatan was appointed guardian ad litem for Anita Litalien, who became incapacitated.

² As we will explain, if the Arbitration proceeds as a consumer arbitration defendants might be entitled to a waiver of any arbitration fees.

We conclude it was error to dismiss this Action without giving plaintiff notice and an opportunity to be heard. So, we reverse and remand to the trial court with directions. If the court again elects to treat the motion to compel arbitration as a motion to dismiss, then it must give the parties notice and an opportunity to be heard. The court may also rule on the merits of the petition to compel arbitration or stay this Action.

Defendants' unopposed motion to augment the record to include the reporter's transcript of the hearing on the petition to compel arbitration and the order substituting Geatan into the action is granted. We also grant defendants' unopposed request for judicial notice of the Local Rules of the Orange County Superior Court (Local Rules), and of the JAMS Comprehensive Arbitration Rules and Procedures (JAMS Rules).

FACTS AND PROCEDURAL HISTORY

In 2013, defendants' residence was damaged by a plumbing leak which led to a dispute with their insurance company. In connection with the 2015 settlement of defendants' action against the insurance company, plaintiff was engaged to repair defendants' home.

Plaintiff's proposed construction contract contained an arbitration provision, which defendants did not want. After negotiations, the final construction contract (Contract) contained an arbitration provision requiring any controversies, claims or disputes to be subjected to binding arbitration at JAMS. It also stated when the arbitration was concluded, "the arbitrator shall reallocate the prevailing party's reasonable attorney fees" and other fees and costs of arbitration to the nonprevailing party. The arbitration provision allowed plaintiff to file an action to enforce a mechanic's lien and required plaintiff to seek a stay of the action pending a final decision in the arbitration, including mechanic's lien issues. The parties signed a separate acknowledgement of the arbitration provision.

After the repair work commenced defendants filed an action (Construction Defect Action) against plaintiff for breach of the Contract and for fraud, alleging, among other things that the repair work was not completed on time and was defective.³ When plaintiff demanded defendants dismiss the Construction Defect Action and “comply with their contract obligations,” defendants dismissed it and filed a demand for the Arbitration at JAMS. In the demand defendants indicated the Arbitration was a “consumer arbitration” as defined by the California Rules of Court Ethics Standards for Neutral Arbitrators, Standard 2(d) and (e), and defendants declared they had a gross monthly income of less than 300 percent of the federal poverty guidelines, thus entitling them to a waiver of any arbitration fees. The demand form explained a consumer arbitration involves a contract with consumer party, drafted by the non-consumer party, that requires the consumer party to accept the arbitration provision.

A short time later plaintiff recorded a mechanic’s lien against defendants’ home and filed an action to foreclose the lien (Mechanic’s Lien Action). Defendants brought a petition to compel arbitration of the Mechanic’s Lien Action and to consolidate it with the Arbitration. The court granted the petition and ordered “the subject of this lawsuit” to arbitration (Mechanic’s Lien Arbitration), but did not consolidate it with the Arbitration.

Thereafter, the parties executed a stipulation to, among other things, consolidate the Arbitration and the Mechanic’s Lien Arbitration. The stipulation also contained agreements as to discovery and provided that if the parties could not agree as to a provision in the stipulation, the arbitrator would resolve it. The stipulation did not mention a consumer arbitration.

Three weeks later plaintiff filed with JAMS an objection to JAMS’s jurisdiction to conduct the Arbitration and to the designation of the Arbitration as a

³ At the time the Construction Defect Action was filed the repair work on defendants’ home had not yet been completed.

consumer arbitration. After defendants filed a response, JAMS advised the parties it had reviewed their documents and determined the Arbitration would proceed as a consumer arbitration until an arbitrator was appointed and could resolve the issue.

Shortly thereafter, plaintiff filed a case management conference statement in the Mechanic's Lien Action again objecting to the consumer arbitration designation. It stated plaintiff would likely file a motion to remove the Mechanic's Lien Action from the Arbitration. Defendants' case management statement referred to their concurrently filed status report in the Construction Defect Action, stating it had been stayed pending arbitration and plaintiff had not complied with the order compelling arbitration of the Mechanic's Lien Action.

After initially refusing to advance commencement fees, plaintiff paid some fees to enable appointment of an arbitrator. JAMS served a commencement letter in January and an arbitrator was appointed. Plaintiff also submitted its breach of contract and common counts counterclaims against defendants. But plaintiff did not pay the other arbitrator's fees so there was no ruling by JAMS as to plaintiff's objection to a consumer arbitration, nor was there any progress on the Arbitration itself.

Plaintiff thereafter dismissed the Mechanic's Lien Action without prejudice and released the mechanic's lien, although it did not dismiss the Mechanic's Lien Arbitration. In May 2017 plaintiff filed this Action in the superior court of Orange County seeking a declaration the Arbitration was not a consumer arbitration and the arbitration provision in the Contract was unenforceable based on JAMS's preliminary decision to treat the Arbitration as a consumer arbitration.

Defendants filed a notice of related action and a petition to compel arbitration of this Action. The court continued the hearing on the petition to compel arbitration pending a determination as to whether this Action should be transferred to the judge who had been hearing the Mechanic's Lien Action, the Honorable Geoffrey T. Glass. It noted the face page of this Action did not disclose the related case, citing to

Local Rule 309, entitled “Improper Re-filing of Cases,” which prohibits a party from dismissing and then refileing a case to have it assigned to a different judge. “Whenever a case is dismissed and thereafter another case is filed involving the same, or essentially the same, parties, facts, or causes of action as the prior case,” the plaintiff in the new case must disclose that information on the face page of the complaint so the action can be assigned to the same judge as the prior case. Subsequently, the court transferred this Action to Judge Glass.

At the hearing on the petition to compel arbitration,⁴ the court treated it as a motion to dismiss and dismissed this Action “without prejudice to assert any legitimate arguments in any attack upon the final award.” The court characterized this Action as “essentially a request for the court to force JAMS to conduct the arbitration and enforce its own rules in a certain way.” The court noted that because it had ordered the Mechanic’s Lien Action to arbitration, it had “relinquished most of its control over the litigation,” including how the arbitrator applied the JAMS’s rules. And the court ordered the arbitrator to resolve the questions raised by the declaratory relief action, i.e., the dispute over whether it was a consumer arbitration.

DISCUSSION

Plaintiff contends the court erred by treating the motion to compel arbitration of this Action as a motion to dismiss and by dismissing this Action without first giving plaintiff notice and opportunity to be heard. We agree in part.

“The constitutional guarantee of due process requires that a court give notice to a party and an opportunity to respond before sua sponte dismissing an action.” (*In re Marriage of Straczynski* (2010) 189 Cal.App.4th 531, 538.) Here, the court’s dismissal without such notice violated plaintiff’s due process rights. (*Id.* at pp. 538-539.)

⁴ At the same hearing the court denied defendants’ motion for sanctions under Code of Civil Procedure sections 128.5 and 128.7.

Morris B. Silver M.D., Inc. v. International Longshore & Warehouse Etc.

(2016) 2 Cal.App.5th 793 (*Silver*), on which defendants rely, is inapt. In *Silver* the defendant demurred to a complaint dealing with the federal Employee Retirement Income Security Act of 1974 (29 U.S.C. § 1001 et seq. (ERISA)) on the grounds it was preempted by ERISA. Instead of ruling on the demurrer directly, on its own motion the court dismissed the complaint on preemption grounds. On appeal, while noting the ruling was “irregular,” the appellate court nonetheless ruled the error harmless because the parties had addressed preemption in their moving and opposition papers. (*Silver* at p. 798.) It further stated the dismissal was the equivalent of sustaining the demurrer. (*Ibid.*)

But this case is different. The petition to compel arbitration of this Action did not request or even mention dismissal, and dismissal was not briefed. Plus, dismissing this Action was not the equivalent of sending it to arbitration.

We can sympathize with the trial judge and share his frustration with plaintiff’s filing of this Action, especially in light of its failure to disclose the related action. But the court did not have the authority to dismiss this Action without giving plaintiff the opportunity to be heard on the issue. Thus, the judgment must be reversed.

Even so, the court had the power to treat the petition to compel arbitration as a motion to dismiss. (See *Stephen Slesinger, Inc. v. Walt Disney Co.* (2007) 155 Cal.App.4th 736, 763 [“inherent power to dismiss for pervasive misconduct”]; *McKenna v. Elliott & Horne Co.* (1953) 118 Cal.App.2d 551, 555 [“inherent power to dismiss an action which is clearly shown to be sham and without merit”].) This power to dismiss is not limited to grounds provided by statute. (Code Civ. Proc., §§ 581, subd. (m) [stated grounds for dismissal not exclusive], 583.150 [inherent authority of court to dismiss].)

On remand, if the court again chooses to treat the petition to compel arbitration as a motion to dismiss, then it must give the parties notice and an opportunity to be heard on the issue. The court may also elect to consider the petition on the merits,

which could result in denying the petition to compel arbitration; granting the petition to compel arbitration and ordering this Action to arbitration; staying this Action; or some combination of these options. Any arguments as to merits of this Action or the propriety of the Arbitration proceeding as a consumer arbitration are not before us and we express no opinion on them.

DISPOSITION

The judgment is reversed, and the matter is remanded for further proceedings consistent with the directions in this opinion. The requests to augment the record and for judicial notice are granted. In the interests of justice, the parties shall each bear their own attorney fees and costs on appeal.

THOMPSON, J.

WE CONCUR:

MOORE, ACTING P. J.

IKOLA, J.